

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER ROCH FREDDO	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES	:	No. 97-4272

MEMORANDUM ORDER

Plaintiff filed a pleading entitled "Civil Rights Complaint" against the United States. Plaintiff appears to assert Eighth Amendment and FTCA negligence claims arising from an incident during a power failure at Fort Dix F.C.I. on June 22, 1996 when a fellow inmate allegedly attacked plaintiff while he slept in his cell. Plaintiff alleges that prison authorities did not provide adequate lighting and supervision during the power failure to ensure the safety of inmates. Plaintiff alleges that as a result of the attack, he suffers from chronic thigh pain, sleeplessness and emotional distress.

Plaintiff originally filed an Administrative Tort Claim with the Federal Bureau of Prisons on November 11, 1996. See 28 C.F.R. § 543.30 et seq. In that claim, he stated that he was attacked due to inadequate lighting and security. He requested \$250,000 in damages for injuries described as nightmares, insomnia, nervousness and chronic pain in his lower inside thigh.¹

¹In his complaint, plaintiff asks for compensatory damages of \$2,000,000 or in the alternative an order vacating his sentence. Plaintiff has presented no basis on which his sentence should be vacated and this court is not empowered to do so.

On May 7, 1997, plaintiff was notified by letter that his claim was denied by the Northeast Regional Counsel of the Federal Bureau of Prisons. The letter advised that plaintiff could bring an action against the United States in an appropriate district court within six months. Plaintiff initiated the instant action seven weeks later, although service was not effected until August 4, 2000. Defendant has filed a motion to dismiss or alternatively for summary judgment on the ground that plaintiff did not exhaust his administrative remedies for constitutional torts.²

²In a footnote, defendant also questions venue on the ground that plaintiff resides in New Jersey and the pertinent events occurred in New Jersey. In a tort claim against the United States, venue is proper only where the plaintiff resides or where the tort occurred. See 28 U.S.C. § 1402(b). As to constitutional claims, venue is proper where the plaintiff resides or where a substantial part of the events or omissions giving rise to the claim occurred. See 28 U.S.C. § 1391(e). Otherwise, venue is proper only where the plaintiff resides. See 28 U.S.C. §§ 1402(a)(1); 1346(a)(2). The events complained of unquestionably occurred in New Jersey. Defendant states that "[p]laintiff resides in New Jersey." It is unclear, however, if this refers to defendant's previous residence or the New Jersey prison in which he is currently incarcerated. A prisoner's place of incarceration is not his residence for venue purposes. See Ellingburg v. Connett, 457 F.2d 240, 241 (5th Cir. 1971); Flanagan v. Shively, 783 F. Supp. 922, 935-36 (M.D. Pa.) (inmate not resident of district in which he is incarcerated absent evidence of intent to remain there upon discharge), aff'd, 980 F.2d 722 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993); O'Brien v. Schweiker, 563 F. Supp. 3d, 301, 302 (E.D. Pa. 1983) (prisoner retains domicile he had at time of incarceration); James Wm. Moore, Moore's Fed. Practice § 110.03[1] (3d ed. 2000). The burden is on the objecting party to demonstrate that venue is improper. See Myers v. American Dental Ass'n., 695 F.2d 716, 724-25 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983). Without further information about plaintiff's previous residence, the court cannot determine that venue is improper.

To the extent that plaintiff asserts constitutional claims, they must be dismissed as it is undisputed that plaintiff did not exhaust his administrative remedies for such claims as required by the Prison Litigation Reform Act ("PLRA"). See 42 U.S.C. § 1997e(a); Booth v. Churner, 121 S. Ct. 1819, 1825 & n.6 (2001).³

The complaint, however, is fairly construed to assert a tort claim under the FTCA as well. Plaintiff states in his complaint that his § 1983 claim is "brought in conjunction with plaintiff Freddo's original 28 U.S.C. § 2672 tort claim" and asks that the new allegations "be accepted as a supplement to his previous tort claim." Plaintiff also appends his administrative tort claim to the complaint.

Plaintiff has exhausted administrative remedies for the FTCA claim pursuant to 28 U.S.C. § 2675(a). See 28 C.F.R. §§ 543.30-543.32. The allegations in the complaint set forth a tort claim of negligence against the United States sufficient to withstand a motion to dismiss and defendant has submitted nothing to show it is entitled to summary judgment on this claim. To demonstrate negligence under New Jersey law, plaintiff must show that the Bureau of Prisons did not "employ the care of a reasonable and prudent person in the protection of prisoners against reasonably foreseeable risks." Harris v. State, 288 A.2d 36, 40 (N.J.

³The applicable administrative remedy procedure for a constitutional violation is detailed in 28 C.F.R. §§ 542.10-542.16.

Super. 1972).⁴ To sustain his claim, plaintiff must establish that the breach of that duty proximately caused him to suffer actual damages. See Ramirez v. United States, 998 F. Supp. 425, 436 (D.N.J. 1998). Plaintiff alleges that the federal prison officials knew there was an enhanced risk to inmate safety because of a power failure, failed to take reasonable security precautions to protect him and that he was attacked and proximately suffered physical harm as a result.

ACCORDINGLY, this day of June, 2001, upon consideration of defendant's alternative Motions to Dismiss (Doc. #10, part 1) and for Summary Judgment (Doc. #10, part 2), **IT IS HEREBY ORDERED** that defendant's Motion to Dismiss is **GRANTED** as to plaintiff's constitutional claims which are **DISMISSED** without prejudice, and defendant shall have until July 20, 2001 to sustain a challenge to venue for the FTCA claim by demonstrating that plaintiff is not a resident of this district; defendant's alternative Motion for Summary Judgment is **DENIED**; and, plaintiff's Motion to Continue Civil Motion (Doc. #11), which is in fact not a motion but rather plaintiff's response to defendant's motions, is **DENIED** as moot.

BY THE COURT:

JAY C. WALDMAN, J.

⁴The law of the state where the act or omission giving rise to liability governs an action under the FTCA. See Toole v. United States, 588 F.2d 403, 406 (3d Cir. 1978); Ferguson v. United States, 792 F. Supp. 107, 110 n.3 (E.D. Pa. 1992).

